IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 11128 of 1998

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL

THE HON'BLE SMT. JUSTICE ABHILASHA KUMARI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VIJAY CO-OPERATIVE BANK LTD - Petitioner
Versus
ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE 8 (4) - Respondent

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Appearance :
MR MANISH J SHAH for Petitioner.
MS MONABEN M BHATT for Respondent.

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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HON'BLE SMT. JUSTICE ABHILASHA KUMARI

Date : 13/06/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

By filing the instant petition under Article 226 of the Constitution, the petitioner i.e. The Vijay Cooperative Bank Ltd., has prayed to issue a writ of certiorari or any other appropriate writ or order to quash notice dated March 19, 1997 issued under Section 148 of the Income-Tax Act, 1961 [“the Act” for short], by which it is proposed to reassess income of the petitioner chargeable to tax for Assessment Year 1987-88.

2. The petitioner is a Cooperative Bank. For Assessment Year 1987-88, the petitioner submitted a Return on June 30, 1987 showing `Nil' income. In the Return of Income filed, the petitioner had shown gross total income of Rs. 33,82,681/-, out of which, deduction under Section 80P of the Act was claimed at Rs. 33,82,681/-. The Assessing Officer passed an assessment order dated February 14, 1989 under Section 143(3) of the Act computing income of Rs. 30,453/-. The Assessing Officer disallowed Rs. 5,710/- from the purview of Section 80P of the Act being income from house property, and Rs. 1,200/- being income realised from lockers given on hire. Therefore, the petitioner preferred an appeal before Deputy C.I.T.(A). During the course of hearing of the appeal, the ground that the Assessing Officer erred in not allowing exemption of income of Rs. 5710/- realised from the house property being incidental to business and was, therefore, exempt under Section 80P was not

pressed and, therefore, was rejected. However, the Appellate authority by order dated October 4, 1994 held that the amount of Rs.3,785/- realised from hiring of lockers was entitled to exemption under Section 80P of the Act. The respondent thereafter issued notice dated March 19, 1997 under Section 148 of the Act to the petitioner stating, inter alia, that income had escaped assessment and so stating, proposed to reassess the income chargeable to tax for Assessment year 1987-88. The case of the petitioner is that the notice under Section 148 of the Act is issued beyond the period of four years in respect of 143(3) assessment and as the reasons recorded do not indicate that the assessee had failed to disclose fully and truly all material facts necessary for its assessment, the Assessing Officer has no jurisdiction to reopen assessment, in view of the provisions of the proviso to Section 147 of the Act. Under the circumstances, the petitioner has filed the instant petition and claimed relief to which reference is made earlier.

3. On service of notice of rule, Mr. Rajesh Rewar, Assistant Commissioner of Income-Tax, Cir.8(4), Ahmedabad has filed affidavit-in-reply controverting the averments made in the petition. In the reply, it is stated that before issuance of notice under Section 148 of the Act, reasons have been recorded as well as prior approval/sanction has been obtained as required by the Act and, therefore, challenge to the notice issued under Section 148 of the

Act is not well-founded. It is claimed in the reply that the case was reopened on the basis of decision of the Supreme Court in **M.P.Cooperative Bank Ltd. vs. Additional C.I.T. 218 ITR 438 (SC)**, wherein a view is taken that income derived from the investment in Government securities placed with the State Bank of India or the Reserve Bank of India could not be regarded as an essential part of the assessee's banking activity, as a result of which, the interest on Government securities placed with the State Bank of India or the Reserve Bank of India, would not qualify for exemption under Section 81 (now Section 80P) of the Income-Tax Act and, therefore, the petition should be dismissed.

4. This Court has heard Mr.Manish J.Shah, learned counsel for the petitioner, and Ms. Monaben M.Bhatt, learned counsel for the respondent, at length and in great detail. Along with the affidavit-in-reply, the respondent has produced reasons for issuance of notice under Section 148 of the Act. A bare reading of those reasons makes it evident that the notice under Section 148 of the Act was issued on the basis of decision of the Supreme Court in **M.P.Cooperative Bank Ltd**.(Supra). Neither in the notice dated March 19, 1997 issued under Section 148 of the Act nor in the reasons recorded for issuing notice under Section 148 of the Act it is alleged that the petitioner had failed to disclose fully and truly all the material facts necessary for its assessment for Assessment Year 1986-87. It was

necessary to state so in the notice issued under Section 148 of the Act because it was issued beyond a period of four years and assessment was made under Section 143(3) of the Act. Further, the decision rendered in **M.P.Cooperative Bank Ltd.** (Supra) has been overruled by the Supreme Court in **Commissioner of Income-Tax Vs. Karnataka State Cooperative Apex Bank, `(2001) 251 ITR 194** holding that interest arising from investment made in compliance with statutory provisions to enable it to carry on banking business, out of reserve fund by a cooperative society engaged in banking business, is exempt under Section 80P(2)(a)(i) of the Income-Tax Act, 1961. Moreover, in **Commissioner of Income-Tax v. Baroda Peoples Cooperative Bank Ltd. (2006)280 ITR 282,** the assessee which was a Cooperative Bank, had earned interest from investments in (i) IDBI Bonds, (ii) SBI Bonds, (iii) Sardar Sarovar Narmada Bonds, and (v) Kisan Vikas Patra. The Assessing Officer had treated all the aforesaid investments as `fixed capital' and held that the investments were not available for normal banking business and, therefore, the entire income was taxable. The Special Bench of Tribunal held that income was entitled to special deduction under Section 80P of the Act. In appeal, the Division Bench of this Court held as under :-

> *Section 80P(2)(a)(i) permits a co-operative society engaged in carrying on the business of banking or providing credit facilities to its members to claim deduction of the whole of the amount of profits and gains of business attributable to*

such activity, viz., business of banking or providing credit facilities to its members. On a plain reading it become apparent that the two activities are distinct and separate activities. The first activity, viz., carrying on the business of banking connotes a larger activity than the activity of providing credit facilities to its members. The latter is restricted qua the members of the society while the former is wide enough to take within its sweep as its potential customers, both members and non-members. The interpretation that the latter phrase has a restrictive effect on the former expression "business of banking" ignores the word "or" which occurs between the two phrases. There is no warrant for reading the word "or" as "and". Once the Legislature has used the term "or" the logical consequence that flows from the contextual setting is that it provides for an alternative, a different distinct activity.

While examining a case wherein a co-operative society claims deduction under section 80P(2)(a)(i) one has to bear in mind the object with which the provision is introduced, viz., to encourage and promote growth of the co-operative sector in the economic life of the country in pursuance of the declared policy of the Government. The Supreme Court has also stated that if a question arises as to whether any particular category of income of a co-operative society is exempt from tax what has to be seen is whether the income falls within any of the several heads because each would be a separate and distinct head and merely because conditions for deduction under one head are not satisfied that does not necessarily mean that an assessee is not entitled to deduction under another head wherein the conditions stand fulfilled. Hence the contention on behalf of the Revenue that the first activity, namely, business

of banking, has to take colour from the second activity, namely, providing credit facilities to members does not merit acceptance. Section 80P requires that the profits and gains of business must be attributable to any one or more of the specific activities.

On a plain reading of the Gujarat Co-operative Societies Act, 1961, the scheme which unfolds is that in the case of a society carrying on business of banking, it would be permissible to make investments or deposits in any of the specified investments as provided in section 71 of the Gujarat Co-operative Societies Act including in any of the modes specified in section 20 of the Indian Trust Act, 1882, without there being any upper limit as to the amount that can be invested, once the statutory requirement of reserve fund as stipulated in Section 67(2) of the Gujarat Co-operative Societies Act is satisfied. The provisions of the Banking Regulation Act, 1949, indicate that an entity carrying on the business of banking is not absolutely or wholly free; it is amenable to supervision/regulation. In other words, its investments are subject to scrutiny; and any impermissible investment, if any made, will not be permitted to continue by the regulator, i.e. the Reserve Bank of India. Bearing in mind that section 80P(2)(a)(i) requires a co-operative society and not a co-operative bank defined under the Gujarat Co-operative Societies Act, to be engaged in carrying on business of banking it is not possible to restrict the scope of the business to the definition of "banking" under section 5(b) of the Banking Regulation Act. Even otherwise a banking company including a co-operative society, may accept deposits for the purpose of lending or investment. The definition does not stipulate that investment has to be only to

the extent provided either by the Gujarat Co-operative Societies Act or the Banking Regulation act. Hence, when investments are made in securities, which are a permissible mode of investment, either under the Banking Regulation Act or the Gujarat Co-operative Societies Act read with the Indian Trusts Act income arising therefrom would be attributable to the business of banking and the assessee would be eligible for deduction in terms of section 80P(2)(a)(i).”

5. During the course of hearing of this petition, the learned Counsel for the petitioner has produced xerox copy of order dated February 24, 2006 passed by the Supreme Court in Petition (s) for Special Leave to Appeal (Civil) No(s).3259 of 2006. It is ordered to be taken on record of the petition. It indicates that the decision rendered by Gujarat High Court in **Commissioner of Income-Tax v. Baroda Peoples Cooperative Bank Ltd.**(Supra) was challenged by Income Tax Officer, Surat before the Supreme Court, and that Special Leave Petition was dismissed by the Supreme Court vide order dated February 24, 2006. Thus, in view of decision of this Court in **Commissioner of Income-Tax v. Baroda Peoples Cooperative Bank Ltd.**(supra), as confirmed by the Supreme Court, there is no manner of doubt that the income from deployment of surplus funds would be exempt under Section 80P(2)(a)(i) of the Act. The basis on which notice under Section 148 of the Act was issued, namely, decision of the Supreme Court in **M.P.Cooperative Bank Limited** (Supra) is specifically overruled.

Therefore, notice, which is impugned in the petition will have to be regarded as misconceived in law and will have to be set aside.

For the foregoing reasons, the petition succeeds. The notice dated March 19, 1997 issued by Assistant Commissioner of Income-Tax, Cir.8(2), Ahmedabad under Section 148 of the Income-Tax Act, 1961 proposing to reassess the income chargeable to tax, is hereby set aside. Rule is made absolute. There shall be no order as to costs.

[J.M.PANCHAL,J.]

[SMT. ABHILASHA KUMARI,J.]

(patel)